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CASES CITED

STATUTES CITED

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 943

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION AND PACIFIC MOTOR TRUCKING CO. AND GENERAL MOTORS CORPORATION, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, the appellee Interstate Commerce Commission moves that the judgment of the District Court be affirmed.

STATEMENT

This is a direct appeal from the judgment of a three-judge district court (Juris. St. pp. 42–43) dismissing the appellants' complaint and sustaining the report and order (Juris. St. pp. 44–80) of the Interstate Commerce Commission in *Pacific Motor Truck-*

ing Company Extension—Oregon (and embraced proceedings), 77 M.C.C. 605.

Pacific Motor Trucking Company (PMT) is a wholly owned subsidiary of the Southern Pacific Company, a carrier by rail, which operates rail lines in California, Oregon, Nevada, Arizona, New Mexico, and Texas. PMT possesses certain interstate motor common carrier operating authorities covering the transportation of general commodities, with certain named exceptions, over regular routes generally paralleling the rail lines of the rail parent (Juris. St. pp. 55–56, and 82). In addition, PMT's motor contract carrier operating authority prior to the challenged order of the Commission was accurately summarized in the opinion of the court below as follows (Juris. St. pp. 24–25):

> PMT since December 10, 1935, has held contract carrier operating authority from the Railroad Commission of California for intrastate operations within that State. The Interstate Commerce Commission (hereinafter referred to as the Commission) has issued to PMT four prior contract carrier permits for transportation of new automobiles, new trucks, and new buses, in initial movements in truckaway and driveaway service (1) from Oakland, California, to the non-rail point of Hawthorne, Nevada, and Nevada rail points on the Southern Pacific (MC 78787, Sub 23, issued June 20, 1944); (2) from Los Angeles, California, to Calexico and San Ysidro, California, both on the Mexican border (MC 78787, Sub 27, issued April 21, 1950); (3) from Raymer, California, to points in the Los Angeles Harbor Commer-

cial Zone, for transshipment by water (MC 78787, Sub 30, issued June 22, 1950); and (4) from Oakland, California, to Carson City and Minden, Nevada, both being non-rail points (MC 78787, Sub 31, issued June 21, 1955). PMT's only shipper under these permits has been GM. Thus, prior to filing of the four new applications involved in this case, the Commission had issued to PMT contract carrier operating authority from GM plants in California for physically interstate service across the state line into Nevada, and for foreign commerce physically within California.

The opinion below also describes accurately the four applications for additional contract carrier permits pursuant to Section 209(b) of the Interstate Commerce Act (I.C.C. Docket No. MC–78787 (Sub Nos. 34, 35, 36 and 37)), filed by PMT between October 1955 and October 1956 (Juris. St. p. 25). Briefly, by these applications, PMT sought authority to transport in interstate commerce, as a contract carrier, new automobiles and trucks (1) from General Motors Corporation's (GM) Chevrolet plants at Oakland and Raymer (part of Los Angeles) to all points in the seven states of Washington, Oregon, Idaho, Nevada, Utah, Arizona and New Mexico, and (2) from General Motor's Buick-Oldsmobile-Pontiac plant at South Gate (adjacent to Los Angeles) to all points in the same seven-state area except that Montana was substituted for New Mexico.

Following appropriate administrative proceedings upon the respective applications, together with oral argument before the entire Commission on all four

applications, the Commission, on September 9, 1958, issued the report and order here involved. In brief, the Commission authorized PMT to transport as a contract carrier new automobiles and trucks in initial movements from GM plants at Oakland, Raymer and South Gate, California, to three additional off-rail points in Nevada and to all points in Oregon, Nevada, Utah, Arizona, and New Mexico which are stations on the rail lines of the Southern Pacific Company. (See App. to Commission's report at Juris. St. p. 80.) Thus, the Commission denied PMT authority to serve any points in Idaho, Washington, and Montana, and restricted the authority granted in the other states to points which are stations on the Southern Pacific railroad. Also, the authority granted to PMT was made subject (1) "to the condition that there may from time to time in the future be attached to the permits granted herein such reasonable terms, conditions, and limitations as the public interest and national transportation policy may require", and (2) to the condition that PMT request in writing that its outstanding interstate common carrier certificates of public convenience and necessity be restricted against the transportation of automobiles and trucks (Juris. St. p. 73).

The present action was commenced by the appellants in the court below on October 7, 1958. The appellants are three motor carrier trade associations and six motor carriers. The United States filed an answer stating that "the United States does not participate in the defense of the Commission's order but does not oppose its defense." On January 20,

1959, the three-judge court rendered its detailed and unanimous opinion sustaining the Commission's order on the merits.[1] (Juris. St. pp. 23–41, 170 F. Supp. 38.)

ARGUMENT

1. Section 209(b) of the Interstate Commerce Act authorizes the Commission to issue a contract carrier permit where it appears (so far as here pertinent) "that the proposed operation, to the extent authorized by the permit will be consistent with the public interest and the national transportation policy." The challenged order of the Commission was issued pursuant to Section 209(b).

In *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419 (1951), and in *United States* v. *Texas & Pacific Motor Transport Co.*, 340 U.S. 450 (1951), the Supreme Court sustained the power of the Commission to impose upon the motor common carrier operations of a railroad or a rail affiliate, whether such operations are carried on pursuant to an acquisition under Section 5(2)(b) from an existing motor carrier or pursuant to a certificate of public con-

[1] The court also held, with Judge Bastian dissenting, that none of the appellants had standing to challenge the Commission's order. This standing issue was not raised by the Interstate Commerce Commission, but was urged by the intervening defendants PMT and GM. Since it is well settled that competing carriers may be so affected as to give them standing to challenge an order of the Commission authorizing additional service (*Alton R. Co.* v. *United States*, 315 U.S. 15, 19 (1942)), we submit that by itself the question of whether the court below correctly held that these appellant motor carriers lacked such standing in the circumstances of this case, is not of general importance.

venience and necessity for new or additional service pursuant to Section 207(a), conditions restricting such operations to those auxiliary and supplementary to the train service of the railroad. As reflected in those decisions, the five conditions customarily imposed for this purpose are the following: (1) motor service to be performed only at rail rates and on rail bills of lading; (2) service to be performed only at points which are stations on the railroad; (3) the local character of the motor service to be insured by the designation of key points between or through which shipments may not be transported by motor; (4) contracts between railroad and motor carrier affiliate to be subject to revision by the Commission; and (5) a reservation to the Commission of power to impose further conditions. Later, in *American Trucking Ass'ns* v. *United States*, 355 U.S. 141 (1957), this Court sustained the Commission's power to authorize a rail affiliate to engage in unrestricted motor common carrier operations in special or unusual circumstances in which existing motor carriers cannot or will not meet shippers' transportation needs.

In the present case, the Commission authorized PMT to serve as a *contract* carrier[2] a single shipper,

[2] At the time of the Commission's decision in this case, Section 203(a)(15) provided that:

"The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the

GM, in the transportation of a single commodity, new automobiles and trucks, from three GM assembly plants in California to points which are stations on the Southern Pacific railroad in Oregon, Nevada, Utah, Arizona and New Mexico.[3] The appellants challenge the power of the Commission "in the absence of 'special circumstances'" to "authorize a railroad subsidiary to conduct completely unrestricted motor contract carrier operations to all points on its parent railroad's lines" (Juris. St. p. 3).

In its report, the Commission held that the rationale of *American Trucking Ass'ns* v. *United States, supra,* applied to the grant of contract carrier permits to a rail affiliate (Juris. St. pp. 68–71). At the same time, the Commission explained why some of the five "auxiliary and supplementary" conditions (e.g., movement at rail rates and on rail bills of lading) could not be applied to the proposed contract carrier operations of PMT without converting them to common carriage (Juris. St. pp. 69–71). Thereupon, the Commission concluded (Juris. St. p. 71) that—

> we do not believe that Congress intended, except in unusual circumstances, to allow any railroad, through the medium of a motor subsidiary, to provide all-truck service as a contract carrier in competition with other rail lines and

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assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer."

[3] PMT already possessed California intrastate operating rights to deliver new automobiles and trucks for GM to all points in California.

> independently operated motor carriers without safeguards to insure that such service shall not be broader in scope than its rail operation. In the absence of any showing of unusual conditions in these proceedings, any permits issued to applicant will contain a territorial limitation of the service authorized to points which are stations on the Southern Pacific Railroad. Also a restriction is warranted reserving to the Commission the right to impose in the future any restrictions or conditions which may then appear to be necessary or desirable in the public interest.

Thus, the Commission specifically recognized that in determining applications by a rail affiliate for contract carrier authority under Section 209(b), it must take into account the policy of the proviso of Section 5(2)(b) against unrestricted entry into or dominance of motor transportation by railroads. As this Court noted in *United States* v. *Rock Island Motor Transit Co., supra,* the phrase "auxiliary and supplementary" nowhere appears in the Interstate Commerce Act, but is simply a short-hand phrase for the five conditions which the Commission usually imposes upon common carrier certificates issued to railroads or their affiliates, so as to implement the Congressional policy in the proviso to Section 5(2)(b). Indeed, Section 209(b), as this Court pointed out as to Section 207(a), contains no "language even suggesting a mandatory limitation to service which is auxiliary or supplementary" (*American Trucking Ass'ns* v. *United States,* 355 U.S. at 149). *A fortiori,* Section 209(b) does not prescribe specific limitations which must be imposed

under the "guiding light" of Section 5(2)(b). Rather, as this Court has held, the imposition of varying conditions to different circumstances is "an exercise of the discretionary and supervisory power with which Congress has endowed the Commission" (*United States* v. *Rock Island Motor Transit Co.*, 340 U.S. *supra*, at 442).

Here, the Commission found that for physical reasons contract carrier service by PMT could best meet the specialized needs of GM in the distribution of new automobiles and trucks to a highly competitive market.[4] Section 209(b), on its face, is a Congressional recognition that certain shippers need a specialized transportation service, integrated with their manufacturing operations, which is clearly distinguishable from the nondiscriminatory service which a common carrier must provide. The competitive effect of permitting a rail affiliate to perform such specialized service for a single shipper (which is unwilling to, and may not be compelled to, use the service of existing independent motor carriers) is so limited that the anti-monopoly objectives of Section 5(2)(b) are satisfied by restricting the service to points which are already served by the railroad (particularly since the railroad already had the traffic involved).

Moreover, the reservation of power to impose future conditions upon the contract carrier operations which PMT was authorized to perform, is valid and enforceable (*United States* v. *Rock Island Motor*

[4] We need not emphasize the impact upon a major automobile manufacturer, its employees, suppliers and distributors of any serious inadequacy in the outbound movement of its products.

Transit Co., supra), and gives to the Commission "continuing jurisdiction to make certain that the * * * [permit] issued here does not operate to defeat the National Transportation Policy" (*American Trucking Ass'ns* v. *United States,* 355 U.S. *supra,* at 154).

We submit that the court below was clearly correct in holding that the Commission's action was consonant with the Congressional policy as interpreted by this Court.

2. The appellants' second question presented is "Whether the District Court correctly found the existence of 'special circumstances' justifying the performance of unrestricted motor service by the rail subsidiary, such findings being directly contrary to those of the Commission itself?" (Juris. St. p. 3). It is sufficient to point out that the Commission found that there were not present "unusual circumstances" which would warrant authorizing PMT to perform contract carrier service which was not (1) restricted to points which are stations on the parent railroad, and (2) subjected to the future imposition of additional conditions (Juris. St. p. 71). In contrast, the language in the opinion below which is attacked by appellants is that (Juris. St. pp. 34–35):

> * * * although the Commission found an "absence of unusual conditions" which would justify the issuance of permits for service to points not on SP's rail line, there was, in the court's opinion, substantial evidence of special circumstances justifying the extensions of PMT's contract carrier authority to serve GM.

Read in context, the quoted language of the court below clearly means only that it found the Commission's partial grant of PMT's application warranted in the light of such factors as effect upon other carriers and GM's transportation needs. We submit that the contention is without merit.

3. Appellants contend that the Commission's action violates the prohibition of Section 210 (49 U.S.C. 310) against the same person holding a *motor* common carrier certificate and a *motor* contract carrier permit "for the transportation of property by motor vehicle over the same route or within the same territory," unless the Commission finds "that both a certificate and a permit may be so held consistently with the public interest and with the national transportation policy declared in this Act."

The Commission's detailed discussion of this dual operations issue is found both in its final report (Juris. St. pp. 71–73) and in its prior report in 71 M.C.C. 561 at 563–564 (Juris. St. pp. 85–88) (involving PMT contract carrier service for GM to points in Oregon), which it referred to and adopted in the final report. In its final report, the Commission specifically recognized that "the granting of the instant applications would allow applicant to serve the same shipper both as a contract and common carrier by motor vehicle and, through its parent, as a common carrier by rail" (Juris. St. p. 72).

The Commission dealt with dual common and contract motor carrier operations by PMT in the transportation of automobiles and trucks by providing that the challenged grants of contract carrier authority

"will be made subject to the condition that applicant request in writing the imposition of a restriction against the transportation of automobiles and trucks in its outstanding [common carrier] certificates in No. MC–78786 and various subnumbers thereto which are not specifically restricted against such transportation." (Juris. St. pp. 72–73). This condition has been complied with. Since Section 210 is directed at the possibility for discrimination which exists when a single carrier may offer both common and contract motor carrier service to the same shippers (i.e., of the same commodities and over the same routes), it is clear that the imposition of this condition warranted the Commission's finding that the holding by PMT of common carrier certificates and contract carrier permits "will be consistent with the public interest and the national transportation policy."

Section 210 is silent as to the holding of a contract motor carrier permit by a subsidiary of a railroad common carrier. Nevertheless, the Commission in its prior report (Juris. St. p. 85) held that "we would be remiss in our duty were we to ignore the dual relationship between applicant, as a contract carrier by motor vehicle, and the Southern Pacific Company, as a common carrier by rail. We may inquire into the relationship incidental to the statutory findings necessary under section 209 of the act and in a proper case withhold a grant of authority or impose restrictions necessary to guard against the possibility of practices at which section 210 is aimed." In finding that such dual motor-rail authority should not be a bar under Section 210 to a grant of additional contract carrier

authority to PMT, the Commission properly based its conclusions upon such factors as that the contract carrier operations would be restricted to a single shipper, and that such dual authority (based upon PMT's pre-existing contract carrier authority) had not resulted in the evils at which Section 210 is directed (Juris. St. pp. 87–88).

Moreover, in its final report (Juris. St. p. 73), the Commission added that "our approval of the dual operations at this time should not be construed as any waiver of our right to reconsider the issue at any future date should the present facts change so as to bring about an improper competitive situation or result in improper discrimination or preference." We submit that the Commission's action is wholly consistent with Section 210.

4. The appellants contend that the court below erred in that it "by indirection, seems to have concluded" that the 1957 amendments to the definition of "contract carrier" in Section 203(a)(15) (*supra*, p. 6, fn. 2) and to the standards of Section 209(b) (Juris. St. pp. 29–30) governing the grant of contract carrier permits, "somehow placed a motor contract carrier application by a rail affiliate in a different light than its application to perform motor common carriage" (Juris. St. pp. 14–17). As pointed out above, the Commission both considered and applied in this case the policy of the proviso to Section 5(2)(b). Moreover, it is beyond dispute that the Commission was required, when it decided the applications on September 9, 1958, to apply the criteria which had been inserted in Section 209(b) by the 1957 amendments. *Ziffrin,*

Inc. v. *United States*, 318 U.S. 73, 78 (1943). Thus, appellants' contention reduces to the assertion, in the face of *American Trucking Ass'ns* v. *United States*, *supra*, that a motor carrier controlled by a railroad may under no circumstances engage in contract carrier operations. The argument is without merit, when the narrow and specialized character of contract carriage as defined in Section 203(a)(15), as amended, is viewed in the rationale of the *American Trucking Ass'ns* case.

CONCLUSION

For the foregoing reasons, we submit that the decision below is correct and that this appeal presents no substantial question. The judgment of the district court should accordingly be affirmed.

Respectfully submitted.

ROBERT W. GINNANE,
General Counsel,

JAMES Y. PIPER,
Assistant General Counsel,
Interstate Commerce Commission.

JUNE 1959.

CERTIFICATE OF SERVICE

I, Robert W. Ginnane, General Counsel of the Interstate Commerce Commission, one of the appellees herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the twenty-fourth day of June, 1959, I served copies of the foregoing Motion to Affirm on the several parties to this appeal, as follows:

1. On the appellants, by mailing copies, in duly addressed envelopes, with first-class postage prepaid

to Peter T. Beardsley, Esq., 1424 Sixteenth St. N.W., Washington 6, D.C., Charles W. Singer, Esq., 1825 Jefferson Place N.W., Washington 6, D.C., and Larry A. Esckilsen, Esq., 1111 E St. N.W., Washington 4, D.C., and, with airmail postage prepaid, to Walter N. Bieneman, Esq., 2150 Guardian Building, Detroit 26, Michigan.

2. On the United States of America, appellee, by mailing copies, in duly addressed envelopes, with first-class postage prepaid, to The Solicitor General, Department of Justice, Washington 25, D.C., and John C. Danielson, Esq., Room 3208, Department of Justice Washington 25, D.C.

3. On Pacific Motor Trucking Co., appellee, by mailing copies in duly addressed envelopes, with airmail postage prepaid, to Robert L. Pierce and William E. Meinhold, Esqs., 65 Market Street, San Francisco 5, California, and with first-class postage prepaid, to Edward M. Reidy and Thormund A. Miller, Esqs., 205 Transportation Building, Washington 6, D.C.

4. On General Motors Corporation, appellee, by mailing copies in duly addressed envelopes, with airmail postage prepaid, to Henry M. Hogan and Walter R. Frizzell, Esqs., 3044 West Grand Blvd., Detroit 2, Mich., and with first-class postage prepaid, to Beverley S. Simms, Esq., 612 Barr Bldg., 910 17th St. N.W., Washington 6, D.C.

ROBERT W. GINNANE.

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